

# Guidance on judicial early neutral evaluation in the Queen's Bench Division (Telecom Centre v Thomas Sanderson)

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**Dispute Resolution analysis:** In a contractual dispute in the Queen's Bench Division (QBD), the master considered that a case was appropriate for judicial early neutral evaluation (ENE). However, unlike the Chancery Guide, it is apparent that the Queen's Bench Guide (QBD Guide) does not contain any specific information as to the use of judicial ENE. Nor indeed are there any procedural rules contained in the CPR. Accordingly, the master provided some comments on the approach she considered should be used, tailored for the QBD. She also provided a template draft order which may be suitable for use in judicial ENE cases in the QBD. Written by Jon Felce, partner at PCB Litigation LLP.

*Telecom Centre (UK) Ltd v Thomas Sanderson Ltd (Early Neutral Evaluation)* [\[2020\] EWHC 368 \(QB\)](#)

## What are the practical implications of this case?

The practical implications of the case include the following:

- practitioners may wish to advise clients that, in appropriate cases, ENE is being increasingly encouraged. That said, mediation may remain the preferred form of ADR, not least for multi-faceted complex claims for which ENE may be inappropriate
- there may be changes in relation to ENE in the QBD Guide. The decision may also lead to a consideration of whether other court guides and/or the CPR need to be amended in respect of ENE process
- while the master's judgment and template order provides a useful starting point for practitioners in terms of the procedural issues to be considered (at least in the QBD; there may be different considerations in other courts), other issues the parties may wish to consider are:
  - whether the substantive proceedings should be stayed pending the ENE
  - whether the ENE should be conducted entirely on paper
  - whether there should be any direction for the provision of particular documents or information by a party
  - how the costs of the exercise are borne, for example whether each side bears its own costs or costs are in the case (not least since the parties may effectively be preparing for trial)

## What was the background?

This case concerns the alleged wrongful termination of a contract for the provision of phone-based customer services. It was originally in the Business and Property Courts, before being transferred into the QBD where it was assigned to a master.

The case is of interest in relation to the master's guidance in relation to judicial ENE. ENE is a form of alternative dispute resolution involving an independent party giving an impartial view about a dispute or a part thereof. It differs from mediation where the focus is facilitative.

The master had raised whether or not the parties might be assisted by some form of judicial ENE and, if so, in respect of what parts of the case. However, the master considered that the QBD Guide lacked specific information as to the use of ENE before QBD masters. Further, that the process to be adopted for judicial or other ENE is not stated in the CPR. As such, she set out the process to be followed in the case so that it might assist other litigants, and provided a template draft order that could be used. She also intended to supply a copy of the judgment to the author of the QBD Guide for information and consideration.

Although [the Chancery Guide](#), in contrast to the QBD Guide, has a section on ENE in that court, the master tailored her approach to the circumstances applicable to litigation before QBD masters.

### What did the court decide?

The master's approach was as follows:

- ENE may be used in respect of any or all issues in a case
- an ENE process is confidential, such that absent the parties' agreement the judge dealing with ENE will not hear the case or contentious applications
- while [the Chancery Guide](#) suggests that the judge's ENE opinion is to be provided informally and a half day hearing may be necessary, in QBD cases it should be a matter for the judge to decide the form and degree of (in)formality of the ENE opinion and any appropriate time estimate for a hearing
- absent a mutual waiver, the judicial ENE outcome will normally be without prejudice
- unless the parties agree, the ENE opinion will not be binding
- the papers considered at the ENE will not be retained in the court file and will be returned to the parties after the ENE to maintain the confidentiality of the process

The master also set out a generic version of the ENE order to be made in the case, containing additions for adaptation for other QBD cases. That draft order addresses:

- exchange and length of skeleton arguments
- timing and nature of written evidence
- the provision of a core bundle of documents for the master, and the return of the papers post-ENE appointment
- the listing and time estimate for the ENE appointment
- the form of the ENE opinion
- the involvement of the judge after the ENE appointment

### Case details

- Court: Queen's Bench Division
- Judge: Master Victoria McCloud
- Date of judgment: 20 February 2020

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